APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3250

MATTHEW STARK, MARCIA NEELY,
Plaintiffs/Appellees,

v.

INDEPENDENT SCHOOL DISTRICT, No. 640, and the members of its Board of Directors,
Defendant/Appellant,

LEON PLAETZ, CURTIS TROST, SCOTT FREDERICKSON, TOM FRANTA, BARB BERANEK, ALOIS GUETTER,
Defendants.

JEFF PASKEWITZ, MAVIS PASKEWITZ, STUART PASKEWITZ, BEN PASKEWITZ, RON PASKEWITZ, NAOMI PASKEWITZ, CARRIE PASKEWITZ, JOE PASKEWITZ, GORDON BARBER, TWYLA BARBER, PETER BARBER, CINDY LOGAN, SHELDON LOGAN, JOANNA LOGAN, CLAYTON PASKEWITZ, LINDA PASKEWITZ, TRISHA PASKEWITZ, MINNESOTA EDUCATION ASSOCIATION, MINNESOTA FEDERATION OF TEACHERS,
Amicus Curiae.

Appeal from the United States District Court
for the District of Minnesota

Submitted: November 20, 1996
Filed: August 21, 1997

Before WOLLMAN, BEAM, and MURPHY, Circuit Judges.

WOLLMAN, Circuit Judge.

This is an appeal from an injunction enjoining the operation of a public school. We reverse and remand with directions to dismiss the complaint.

Factual Background

Independent School District No. 640 (the district) is a rural school district located in southwestern Minnesota. It covers approximately 225 square miles of agricultural land, including the towns of Wabasso and Vesta. The district operated elementary schools in both Wabasso and Vesta until the 1983-84 school year. It closed the Vesta elementary school and sold the building in May 1984. Thereafter, the Vesta children attended the Wabasso school, which is approximately fourteen miles from Vesta.

Lloyd Paskewitz bought the old Vesta elementary school building in 1991. Paskewitz and several other Vesta families are members of a religious group known as the Brethren, a group that originated in Dublin, Ireland, in the late 1820s.[1] *See* Bryan Ronald Wilson, *"The Brethren" A Recent Sociological Study* (1981). (Appellees' App. Ex. W.) It is undisputed that the Brethren have a sincerely held religious belief in avoiding the use of technology, including televisions, radios, videos, films, and computers.

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[1] Paskewitz estimated that approximately 115 of the 300 people living in Vesta as members of the Brethren.

In August 1992, Paskewitz, on behalf of several of the Vesta Brethren families, wrote to Dr. George Bates, the district's superintendent, about the possibility of reopening the Vesta elementary school in the form of a multi-age classroom. Paskewitz offered to lease space in the old school to the district in consideration of the district's providing a teacher and supplies. Pasketwitz's letter stated, "[w]e would have no objection to it being a public school," but requested that "the charter of the school in Vesta" contain a clause stating "[t]hat no T.V., Radios, Videos, and Computers be used." Paskewitz stated that there were approximately twenty-one Brethren children that would be interested in attending and that the group had heard that other, non-Brethren children might be interested in attending the Vesta school. Paskewitz's letter also noted that the Brethren children would not require transportation or school lunches, as the children could walk to school and would go home for lunch in accordance with their religious beliefs.

Dr. Bates attested that he considered the feasibility of opening a multi-age classroom in Vesta. He stated that the primary benefits of such a classroom included the reduction in the number of students being bussed to Wabasso, the availability of an additional multi-age classroom, the reduction in class sizes in grade-specific classrooms, and the alleviation of space shortage in the Wabasso building. He noted that the relative costs of the proposed classroom were minimal. After holding public meetings, the school board unanimously approved the proposal. Members of the school board attested that they approved the opening of the Vesta school for several reasons, most of which were financial. Opening the Vesta school would prevent the Brethren children from possibly being home-schooled, which would have meant a loss in state aid of roughly $3,200 for each student withdrawn from school. A Vesta school eliminated the need to bus Vesta students to Wabasso, and it was more economical to send one teacher to Vesta than to bus Vesta children to Wabasso. Additionally, opening a multi-age classroom in Vesta would

provide educational benefits for those students who otherwise might have been home-schooled. Dr. Bates and the school board members attested that during the approval process they did not discuss the religious backgrounds of the parents or students who might attend the Vesta school, nor were those religious backgrounds relevant to their decision.

A three-year lease was signed on October 12, 1993, by the district, Paskewitz, and the Brethren.[2] The lease provided that the Vesta school would be operated by the district in the form of a multi-stage classroom and would be "a public school for any resident student in the School District." The district would provide teachers and administrative services, establish the curriculum "in compliance with state laws and rules," and provide classroom materials for instruction. The parents of the Brethren children would "have the right to comment on and provide input regarding" classroom materials "to the extent as other parents in the School District," but the district retained "the sole discretion" regarding "final approval" of textbooks and instructional materials. The lease provided that "[t]he School District shall, to the extent permitted under applicable law and rules and regulations . . . limit the use of technology such as television, radio, and/or video recordings, computers and movies in the classrooms at the school." The district would provide education, certain federally funded educational services, and counseling services, as well as instruction in health, physical education, and music at the Wabasso School to any Vesta students needing them.[3] The lease stated that "[a]ll

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[2] Although the "Brethern" [sic] was an additional party to the lease, the person who signed the lease allegedly on the Brethren's behalf has attested that he had no authority to do so. Furthermore, there is no evidence in the record that the Brethren had any ownership interest in the Vesta school building. Thus, we find little significance in the fact that they are a party to the lease.

[3] The lease stated that hot lunch would also be provided at the Wabasso school, but the district has said that it would cater hot lunches to students at the Vesta school if needed.

policies adopted by the [School District] . . . shall apply at the [Vesta] school." Paskewitz and the Brethren agreed to pay all utilities, provide custodial services, repair and maintain the building and grounds, pay property taxes, provide property and liability insurance related to the building, and remove snow.

The district planned to operate three multi-age classrooms during the 1993-94 school year, two in Wabasso and one in Vesta. The district solicited students for these classrooms, and fifty-four students signed up and were allowed to request which school they wished to attend. Thirty-five chose the Wabasso school, and the remaining nineteen chose the Vesta school. Eleven parents of twenty-nine current or former Vesta students attested that they preferred sending their children to the Vesta school rather than the Wabasso school because they liked the convenience of having their children attend a school within walking distance and having their children come home for lunch. They also preferred the multi-age Vesta classroom to a grade-specific one in Wabasso.[4] Although the Vesta school is open to any student in the district who wishes to attend there, apparently only Brethren children have attended the Vesta school since it opened.

Dr. Bates and the two Vesta teachers attested that the same elementary curriculum is taught at the Vesta school as is taught at the Wabasso school. Technology, in the form of computer instruction, is a standard part of that curriculum for each grade level. The teachers testified that when the Vesta school first opened, students wishing computer instruction would have been bussed to the Wabasso school to receive it. Both attested that the district now provides computer and audio/visual equipment to them at the Vesta school upon request. Although technogoly is available to all students, both teachers testified

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[4] The multi-age classrooms in Wabasso were open only for the 1993-94 school year.

that they do not regularly use technology in their classroom instruction.

Minnesota law requires school districts to establish a procedure that allows parents to review the content of instructional materials provided to a minor child. If the parent objects to that content, the district must make reasonable arrangements for alternative instruction. *See* Minn. Stat. Ann. § 126.699 (West 1994). The district's policy allows students with religious objections to be excused from objectionable class or activities. If the class or activity is a required one "suitable alternative activities shall be provided." Dr. Bates attested that the district has received numerous objections to various activities, including the use of computer technology, drug education, self-esteem training, certain books and audio and visual presentations, and sex education; that the district does not inquire into the motivations for a parent's objections; and that the district provides alternative instruction.

All of the Brethren parents have objected to the use of computers at the Vesta school and have asked for alternative instruction for their children, which has been provided. Accordingly, the educational curriculum at the Vesta school does not include the use of computers, videos, films, or audio presentations. While the Brethren children were attending the Wabasso school prior to the reopening of the Vesta school, the district accommodated their religious objections and allowed them to avoid participating in the use of technology.[5] It is undisputed that, in light of the accommodations the district would make at the Wabasso school for the Brethren children, the Brethren children have received exactly the same education at the Vesta school that they would have received if they had continued to attend the Wabasso school. It is also undisputed

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[5] The district also supplied the Brethren children with a separate lunch table at the Wabasso school.

that no religious instruction has taken place at the Vesta school and that no religious artifacts are present.

Procedural History

Matthew Stark and Marcia Neely are Minnesota citizens utilizing taxpayer standing who filed suit against the district [6] seeking a declaratory judgment that the creation and operation of the Vesta school violates the Establishment Clause of the First Amendment to the United States Constitution and article 1 section 16 of the Minnesota Constitution. They also sought an injunction prohibiting the district from operating the Vesta school in conformance with Brethren beliefs, a judgment requiring the district to refund to the State of Minnesota all state aid the district received for children attending the Vesta school, and an award of attorney fees.

The case was submitted to the district court on cross-motions for summary judgment. The court concluded that "the facts presented by this case provide a clear example of state sponsorship, or the advancement of a religion which violates the mandates of the First Amendment." The court concluded that the district had modified the Vesta school's curriculum "based solely on the request of a religious group."

The district court further concluded that the primary effect of the opening of the Vesta school was that of promoting religion; that "the opening, and the manner of operation of, the Vesta school lacks a secular purpose and was done to conform to the religious beliefs of the Brethren"; and that the district had thus created "an impermissible identification of its powers and duties with the religious beliefs of the Brethren." The court entered an injunction permanently enjoining the district "from

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[6] The plaintiffs also sued members of the school board, Paskewitz, and the Brethren. These defendants were dismissed at various times, and their dismissals are not raised on appeal.

operating the Vesta School or any other school in conformance with the Brethren's religious objections to the use of computers and other technology and media." The court did not rule on the refunding of state aid money or on the matter of attorney fees.

Following the district court's denial of the district's motion for a stay pending appeal, we entered an order staying the district court's injunction. Stark and Neely have moved to dissolve the stay. Stark and Neely have dismissed their refund claim, and their claim for attorney fees has been stayed pending the outcome of this appeal.

First Amendment

We begin by noting that the decision by the district to open a school and to accommodate parental requests for exemption from aspects of the district's chosen curriculum falls within the heartland of the "comprehensive powers and substantial discretion" that are generally afforded to school districts in "discharg[ing] the important tasks entrusted to them." *Pratt v. Independent Sch. Dist. No. 831*, 670 F.2d 771, 775 (8th Cir. 1982). *See Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) ("[C]ourts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education."). Despite this considerable discretion, courts have recognized that school boards must exercise their powers " 'in a manner that comports with the transcendent imperatives of the First Amendment,' " and courts "have been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (quoting *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982)).

As the Supreme Court has stated, courts "do not . . . intervene in the resolution of conflicts which arise in the

daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *Cf. Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2448 (1995) (plurality opinion) "[O]utsiders or individual members of the community uninformed about the school's practice . . . *might* leap to the erroneous conclusion of state endorsement.").

A.

The applicable test for evaluating whether state action has violated the Establishment Clause is that established by *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389 n.7 (1993) ("*Lemon*, however frightening it may be to some, has not been overruled."). "In order to satisfy the *Lemon* test, a challenged governmental action must (1) have a secular purpose, (2) not have the primary or principal effect of advancing religion, and (3) not foster an excessive entanglement with religion." *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1508 (8th Cir. 1994) (footnote omitted) (citing *Lemon*, 403 U.S. at 612-13). *See also Agostini v. Felton*, Nos. 96-552 & 96-553, 1997 WL 338583, at *19 (U.S. June 23, 1997) ("Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

The decision to open a school in Vesta furthers the valid secular purpose of educating the district's children. *See Mueller v. Allen*, 463 U.S. 388, 395 (1983) (state has "secular purpose of ensuring that the State's citizenry is well educated"); *Wolman v. Walter*, 433 U.S. 229, 240 (1977) ("There is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education."); *Everson v.*

Board of Educ. of Ewing Tp., 330 U.S. 1, 7 (1947) ("It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."). The district's decision to open the school in Vesta was based upon the secular reasons of space efficiency, savings in transportation costs, and the addition of a multi-age classroom and corresponding reduction in class sizes. Further, the decision forestalled the plans of certain parents to home-school their children and thus prevented a reduction in the amount of state aid flowing to the district, funding that benefits all students within the district.

Relying primarily on *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2d Cir. 1986), the district court concluded that the primary effect of the district's decision to open the school at Vesta was to promote religion. The court noted that the Vesta school is perceived as a Brethren school and that the district had thus "create[d] an impermissible identification of its powers and duties with the religious beliefs of the Brethren."

Quinones involved a plan to educate Hasidic Jewish girls at a public school by physically separating a group of classrooms from the rest of the school and dedicating them for their use, and providing only female public school teachers who would teach primarily in Yiddish, with English taught as a second language. *See Quinones*, 803 F.2d at 1237. The Second Circuit concluded that this plan created "a symbolic link between the state and the Hasidic sect" which appeared to endorse the separatist religious views of the Hasidic Jews and that the plan thus failed the primary effect test. *See id.* at 1241-42.

This case is distinguishable because the Vesta school does not involve the complete segregation and dedication of part or all of a public facility to a group of students for religious reasons as in *Quinones*. That portion of

Grand Rapids on which the district court relied has now been overruled. *See Agostini*, 1997 WL 338583, at **16, 21.

The Vesta school is a public school open to all, and there is no evidence that any students wishing to attend there have been turned away. Further, that the school board's decision to open the Vesta school coincided with certain parents' desire to see a public school opened in Vesta does not compel a finding that the primary effect of the decision was to advance religion or that the district was sending a message of approval or disapproval of individual religious choices. *See Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989) ("The mere fact a governmental body takes action that coincides with the . . . desires of a particular religious group . . . does not transform the action into an impermissible establishment of religion."). Any incidental benefits to the Brethren's religious beliefs are secondary to the primary effect of providing an additional school for the secular education of Vesta children. *Cf. Good News/Good Sports Club*, 28 F.3d at 1508 (incidental benefits to religion from policy of allowing group access to school property were secondary to primary effect of providing neutral forum for exchange of ideas).

Although a district may not modify its curriculum to conform to a set of sectarian beliefs, *see Edwards v. Aguillard*, 482 U.S. at 593; *Epperson v. Arkansas*, 393 U.S. at 106; *Pratt*, 670 F.2d at 776-79 (removal of film from curriculum), nothing of the sort has happened here. As evidenced by the material submitted to the district court, the district's curriculum has not been altered in any way at the Vesta school, and the same curriculum is taught at Vesta as the Wabasso school. While technology was not initially provided at the Vesta school, and students not exempted from it would have been bussed to Wabasso to receive it, the record shows that technology is now available at the Vesta school. Thus, contrary to the district

court's finding, technology has never been unavailable to students at the Vesta school. In sum, the curriculum—whether the substantive curriculum or the availability of technology—has not been modified or changed in any way at the Vesta school from what is taught at the Wabasso school.

The district granted the parental requests for exemption from technology pursuant to Minn. Stat. Ann. § 126.699 and district policy. Granting the parental requests made pursuant to the statute and the policy served the secular purpose of facilitating the secular education of children at the Vesta school. Even if the district's decision to honor the requests for exemption was motivated by a desire to accommodate the Brethren parents' religious beliefs, such accommodation constitutes a legitimate secular purpose so long as "the relevant governmental decisionmaker . . . [does not] abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987); *see also Lynch*, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state, it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."). The record shows that the district honors all parental exemption requests, regardless of motivation.

The district's actions in granting the parental requests for exemption did not have the primary effect of advancing religion. "A law is not unconstitutional simply because it *allows* churches to advance religion . . . . For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Although the religious beliefs of the Brethren parents were accommodated by the granting of their requests for exemptions, the district itself did not advance

religion by honoring those requests. *See id.* at 336-37 (any advancement of religion as a result of exemption for religious groups in Civil Rights Act of 1964 could not be "fairly attributed" to the government).

We conclude that the district's application of state law and district policy to grant parental requests for exemption will not result in any excessive entanglement. Because the record shows that the district grants all parental exemption requests and routinely provides alternative instruction, its policy actually "promotes less, rather than more," involvement with religion because the district avoids considering parents' motivations—including religious motivations—for requesting exemptions. *See Clayton*, 884 F.2d at 379; *Good News/Good Sports Club*, 28 F.3d at 1510 (no excessive entanglement where, in applying open-access school use policy, school would not have to distinguish among types of groups wanting to use school). The teachers have altered their teaching methods only to the extent necessary to accommodate the parental exemption requests, as they would any exemption request. *See Agostini*, 1997 WL 338583, at *20 ("Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."); *Wolman*, 433 U.S. at 248 ("It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."); *cf. Mueller*, 463 U.S. at 403 (no excessive entanglement from requirement that state officials examine textbooks to determine if they qualify for tax deduction so that deductions for sectarian books could be disallowed).

In conclusion, neither the decision to open the Vesta school nor the district's application of the exemption policies violates the *Lemon* test. Both actions had a secular purpose and did not have the primary effect of advancing religion or endorsing the Brethren's religious beliefs. *Cf. Agostini*, 1997 WL 338583, at *21.

B.

Stark and Neely argue that the present case involves a situation that is indistinguishable from that in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). In that case, the Supreme Court held unconstitutional a special state statute which created a school district for a village defined exclusively along religious lines. *See id.*, 512 U.S. at 693. The "fundamental source of constitutional concern" in *Kiryas Joel* was that the legislature had not exercised its power in a manner neutral to religion. *See id.* at 703. The Court was concerned that "[b]ecause the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law, we have no assurance that the next similarly situated group seeking a school district of its own will receive one." *Id.* (footnote omitted). This lack of neutrality forced the Court to conclude that the creation of the school district violated the Establishment Clause. *See id.* at 704-05. Further, the legislation could not be saved by viewing it as an accommodation of religion because the "proposed accommodation singles out a particular religious sect for special treatment," violating the principle of "neutrality as among religions." *Id.* at 706-07.

This case is not *Kiryas Joel*. As we discussed earlier, the record does not support Stark's and Neely's contention that the district has taken special actions to wrongly benefit the Brethren, and the fact that the district's actions coincide with the desires of certain parents does not mean that the Establishment Clause has been violated. *See Clayton by Clayton*, 884 F.2d at 380.[7] The district here decided, for secular reasons, to open a public school in a

[7] There has been no delegation of political power to the Brethren community in this case. *Cf. Kirvas Joel*, 512 U.S. at 697-702 (plurality opinion) (delegation of political power to group chosen by religious criteria).

building in which a public school had previously been located, a school that is open to all students regardless of religious affiliation. The district grants the requests of all parents for exemptions regardless of religious affiliation.

The extension of a benefit through the neutral application of state law and the district's policy to allow parental requests for exemption from curriculum—even if those requests are motivated by the religious reasons of the parents and the honoring of the requests accommodates those religious beliefs—does not violate the Establishment Clause. The Supreme Court has said:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose idealogies and viewpoints, including religious ones, are broad and diverse.

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2521 (1995); *see also Agostini*, 1997 WL 338583, at *18 ("[W]here the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to religious and secular beneficiaries on a nondiscriminatory basis . . . the aid is less likely to have the effect of advancing religion.").

The state action in this case is well within the boundaries set by cases in which the Supreme Court has upheld "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). *See, e.g., Rosenberger*, 115 S. Ct. at 2521-25 (neutral program paying for printing of student publi-

cations); *Zobrest*, 509 U.S. at 10-14 (sign-language interpreter for deaf student at Catholic high school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 486-89 (1986) (vocational assistance for blind person studying for religious vocation at Christian college); *Mueller*, 463 U.S. at 396-99 (tax deduction for educational expenses); *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981) (open access to university facilities); *Wolman*, 433 U.S. at 237-48 (textbooks, testing, diagnostic and therapeutic services); *Board of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 243-44 (1968) (textbooks); *Everson*, 330 U.S. at 17 (bussing reimbursement). Indeed, by granting exemptions without regard to parental motivations, the district has adhered to the principle that "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Kiryas Joel*, 512 U.S. at 696 (quotation omitted).

To the extent that the district's application of the state law and district policy to grant the parental requests for exemption can be viewed as accommodating religion by removing a burden from the Brethren families (forcing their children to use technology), such action does not offend the Establishment Clause. "[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation." *Lynch*, 465 U.S. at 673. The Establishment Clause is not violated when the government accommodates religious beliefs "by relieving people from generally applicable rules that interfere with their religious callings." *Lee v. Weisman*, 505 U.S. 577, 627 (1992) (Souter, J., concurring); *id.* at 628 ("accommodating religion reveals nothing beyond a recognition that general rules can unecessarily offend the religious conscience when they offend the conscience of

secular society not at all"); *Amos*, 483 U.S. at 334 ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (quoted case omitted)). The district's actions in this case follow our best traditions of the accommodation of religious beliefs in the school context. *See, e.g., Yoder*, 406 U.S. at 234; *Zorach v. Clauson*, 343 U.S. 306, 312-15 (1952); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

C.

Finally, we examine the district's actions under the "endorsement test." *See Kiryas Joel*, 512 U.S. at 720 ("Experience proves that the Establishment Clause . . . cannot easily be reduced to a single test.") (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court has "paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989). The endorsement test has been thus explained:

> [T]he Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Id. at 625 (O'Connor, concurring in part and concurring in the judgment) (quoting *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring)).

As we have discussed, the district has acted neutrally in this case towards the citizens of the district regarding the decision to open the school in Vesta and in applying the exemption policy. Thus, the district has not made anyone's adherence to religion relevant to their standing in the community and consequently has not endorsed religion or a set of religious beliefs.

In sum, the district's actions in this case have not violated the Establishment Clause.

Minnesota Constitution

We must also consider how the district's actions fare under the Minnesota Constitution, for the "limitations contained in the Minnesota Constitution are substantially more restrictive than those imposed by U.S. Const. Amend. I." *Americans United Inc. v. Independent Sch. Dist. No. 622*, 179 N.W.2d 146, 155 (Minn. 1970). The district court did not separately analyze the state constitutional issue, but declared that because the district's actions violated the federal constitution they also violated the state constitution. The issue was briefed on appeal, however, and we exercise our discretion to resolve it because it can be decided as a matter of law. *See Hutchins v. Champion Int'l Corp.*, 110 F.3d 1341, 1345 (8th Cir. 1997) (citing *Talley v. United States Postal Serv.*, 720 F.2d 505, 508 (8th Cir. 1983)).

The Minnesota constitutional provisions preventing the esablishment of religion provide in relevant part that "nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries," Minn. Const. Art. I, § 16, and that "[i]n no case shall any public money or property be appropriated or used for the support of schools wherein the

distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." Minn. Const. Art. XIII, § 2. The "fundamental concept" is "that the state may neither advance nor inhibit religion, which . . . defines permissible limits of legislation under state law . . . law." *Americans United*, 179 N.W.2d at 157. The "establishment clauses prohibit both 'benefits' and 'support' to schools teaching distinctive religious doctrines." *Minnesota Fed'n of Teachers v. Mammenga*, 500 N.W.2d 136, 138 (Minn. Ct. App. 1993).

As shown above, no religious instruction takes place at the Vesta school, and there is no expenditure of public funds in support of the teaching or promulgating of religous beliefs. Accordingly, we conclude that no violation of the state constitution has occurred.

Conclusion

The injunction is vacated, and the case is remanded to the district court with directions to dismiss the complaint.

MURPHY, Circuit Judge, dissenting.

Because I believe that the establishment by the public school district of this special school in Vesta for children of the Brethren goes beyond what is permitted by the first amendment to the United States Constitution, I respectfully dissent.

The district entered into a contractual arrangement with the religious group known as the Brethren to operate a special public school in Vesta tailored to meet the group's religious concerns. Before 1984 the district operated two elementary schools: one in Wabasso and one fourteen miles away in Vesta. After the school in Vesta was closed for economic reasons, children of the Brethren either attended the regular public elementary school in Wabasso or were homeschooled. Various accommodations were made at Wabasso to respect the religious be-

liefs of the Brethren, such as providing separate tables for their children at lunch and excusing them from activities that involved technological devices. Their opposition to the use of technology includes any use of television, radio, audio and video recordings, computers, or movies.

During 1992-93, the Brethren proposed a joint venture with the school district to reopen the elementary school in Vesta and this proposal was approved at a meeting of the school board in February 1993. The minutes of the meeting and contemporaneous newspaper accounts indicate that the school was identified with the Brethren. One such news story stated in part:

> The Wabasso Board of Education has reached an agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.
>
> . . . .
>
> If it is legally possible to establish this school, it would be operated without the assistance of modern technology such as computers, and video and audio equipment. The reasoning behind this is that the Brethren's religious beliefs prohibit them from using such items, and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.
>
> To eliminate the need to remove these children from the public school environment and teach them at home, the Brethren made the proposal for a second school in Vesta last year.

Vicki L. Gerdes, 'Agreement is Reached on Proposed School in Vesta," *Redwood Gazette*, June 17, 1993.

On October 12, 1993, the Brethren, the school district, and Lloyd Paskewitz entered into a formal written agreement to operate a public elementary school in Vesta.[8]

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[8] The majority finds "little significance" in the fact that the Brethren were party to the lease, but the group's inclusion is sig-

Paskewitz had previously purchased the Vesta school building, and the building was made available under the agreement for the district to use free of charge. Paskewitz and the Brethren also agreed to be responsible for all maintenance, security, taxes, and insurance. In return the district would provide a teacher and educational materials and limit the use of technology. Section 6 of the Agreement provides:

> The School District shall, to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District, limit the use of technology such as television, radio, audio and/or video recordings, computers and movies in the classrooms at the school provided for herein.

Sections 8 and 9 indicate that the district envisioned a different set of academic offerings at the Vesta school than at the public school in Wabasso. These sections reserve to the district the right to provide special education, health, music, physical education classes, and hot lunches at the Wabasso elementary school for any students at Vesta who might want to participate in these normally available programs which would not be offered at Vesta because of the preferences of the Brethren.

The Brethren were actively involved in other ways in the reopening of the Vesta school. Lloyd Paskewitz and several other members of the Brethren participated in the interviews conducted to select a teacher for the new school. It is undisputed that it was unprecedented to have non-district employees present at such interviews. On June 1, 1993, Lloyd Paskewitz provided Superintendent Bates with a list of 19 children who planned to attend the school in Vesta, and only these children eventually enrolled in the school.

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nificant in light of the district's claim that it did not take into account the religious background or beliefs of those who requested exemptions from the standard curricula.

There are significant differences between the curricula offered at Vesta and Wabasso. Although the official curricula adopted for the Vesta school calls for at least one half hour of computer lab each week and district officials claim computer technology is available at Vesta, computer training has never been offered. Other forms of technology to which the Brethren object, such as television, video players, and films, have not been used at Vesta, although they are regularly used at Wabasso. The health offerings at Vesta are also not the same as those offered at Wabasso. The drug awareness education programs used in the Wabasso school for kindergarten through sixth grade are not available at Vesta. Although the official curricula at Vesta requires one half hour of physical education each day "with specialists," it is presented in an unstructured manner by a parent volunteer who has no formal training in physical education. At Wabasso it is taught in a structured manner by a physical education teacher. The Vesta curricula officially requires at least an hour of musical instruction each week, but the record does not indicate that music is actually offered. If a child at the Vesta school wants such standard curricula offerings, he or she must make a special request and then commute thirty miles in the middle of the school day to Wabasso for health, physical education, or music classes.

The facts of this case show an abandonment of the principle of state neutrality in religious matters which underlies establishment clause jurisprudence. *See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481, 2487 (1994). The first amendment prohibits the state from favoring one religion over another or from favoring religious adherents collectively over nonadherents. *Id.* (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Religious neutrality is particularly important in the context of elementary and secondary schools, where the students are impressionable and attendance is involuntary. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). While the Supreme Court "has long rec-

ognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause," *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citations and quotations omitted), "accommodation is not a principle without limits," and at some point accommodation may devolve into an unlawful fostering of religion. *Kiryas Joel*, 114 S. Ct. at 2492; *Amos*, 483 U.S. at 334. An asserted motivation of religious accommodation, even if justified by reference to a state statute, cannot shield governmental actions that otherwise violate the principle of neutrality embedded in the establishment clause. *See Kiryas Joel*, 114 S. Ct. at 2493.[9]

Here the school district has done far more than grant individual exemptions to aspects of the public school curricula under state law, for it has entered into a contractual relationship with members of a religious group to tailor a school to their preferences. The district has agreed to limit the use of technology not for pedagogical reasons, but to match the tenets of a single religious group. It also modified the health, music, physical education, and computer curricula normally offered. The district has acted to create a school where a student interested in participating in the standard health, physical education, music, or computer offerings must make a special request and/or commute almost thirty miles during the school day to obtain such regular educational services at Wabasso. It is not surprising that non-Brethren children have not enrolled at Vesta.

This case is similar to *Kiryas Joel* where the Supreme Court found that the creation of a school district based

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[9] The district's decision to reopen the school by entering into a special written agreement with a religious group could not have been motivated by statutory duties because the district approved the proposal from the Brethren to reopen the school in February 1993 and Minn. Stat. § 126.699 (1996) was not passed until May 1993.

on the religious affiliation of the community members was unconstitutional because it impermissibly singled out a particular religious group for special treatment. 114 S. Ct. at 2491. The village of Kiryas Joel had been established as an enclave for a particular sect of Hasidic Jews called the Satmars who, like the Brethren, eschewed much of the modern world and maintained a very isolated community. The Satmar children were normally educated in private religious schools in the village, but these parochial schools did not provide services for handicapped students as required by state law. The New York legislature created a special school district that conformed to the boundaries of the village so that services for handicapped children could be provided in a way acceptable to the Satmars. Since the community of Kiryas Joel did not receive its benefits "simply as one of many communities eligible for equal treatment under a general law," there was no guarantee that the next religious community desiring its own school district would be given one and the arrangement was unconstitutional. *Id.*

Like the legislature in *Kiryas Joel*, the school district has singled out a particular religious group for benefits by setting up a school the Brethren find acceptable in order to retain their participation in the public school system. There is no guarantee that the next religious group in the district (or elsewhere in the state) could obtain a special school for its members supported with a publicly funded teacher teaching a modified curricula in accordance with their religious beliefs. The establishment of the school in Vesta thus violates the principle of neutrality and "crosses the line from permissible accommodation to impermissible establishment." *Id.*

The district argues it reopened the Vesta school to provide a better public education by transporting fewer students from Vesta to Wabasso, reducing the class size in Wabasso, and by lessening a space shortage there as well, but these purposes could have been carried out by

reopening the Vesta school as it had operated before without a special agreement with the Brethren. The only reason the Brethren are involved is that the district presumably could not afford to reopen the Vesta school without the financial assistance they provided directly in the agreement and indirectly by enrolling their children in the public school system. Even if the district was motivated by improving the overall quality of education in its area, it established a school in which the curricula conformed to the religious objections of the Brethren in exchange for financial assistance. This is not an acceptable secular purpose. *See Epperson*, 393 U.S. at 106 ("There is an can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."); *Edwards*, 482 U.S. at 593 (striking down Louisiana's Creationism act because the "purpose of the . . . Act was to restructure the science curriculum to conform with a particular religious viewpoint"); *Pratt v. Independent Sch. Dist. No. 831*, 670 F.2d 771 (8th Cir. 1982) (removing a film from a school curriculum based on religious objections violated the Establishment Clause).

An impermissible effect of governmental action is one that endorses or promotes religion. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-601 (1989); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989). Whether the primary effect is impermissible endorsement of religion can be measured by what reasonable observers, including non-adherents, would conclude. *Allegheny*, 492 U.S. at 595, 627-32 (plurality opinion). As the district court pointed out, the way in which the school was reopened and operated created a perception in the community that the school was really just for the children of the Brethren even though it was theoretically open to all students. The effect of establishing the school was thus an endorsement of the Brethren's beliefs.

The majority relies on *Clayton by Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), for the idea that state action which coincidentally mirrors certain religious beliefs does not have the effect of promoting religion. *Clayton* upheld a rule prohibiting dances at public schools where there is no evidence in the record to indicate why the rule had been passed. *Id.* at 378, 380. In contrast, the actions of the district regarding the school in Vesta did not simply coincide with the beliefs of the Brethren. The record reflects direct involvement of the Brethren in organizing and financing the school. Mr. Paskewitz's letter, the meetings of the school board, and the formal written agreement between the district and the Brethren, all indicate that but for the religious concerns and financial support of the Brethren, the school in Vesta would never have been reopened or operated in the current manner. Here there is far more than mere coincidence between the modifications of the Vesta school program and the beliefs of the Brethren.

The district contends the Vesta school does not advance religion because it is open to all students and the same curricula available at Wabasso is available to Vesta students willing to bus to Wabasso for specific classes, but it is appropriate to look beyond the theory to examine the practical reality of the situation. *See Kiryas Joel*, 114 S. Ct. at 2488-89 (looking at effect of statute, not its form); *Lee v. Weisman*, 505 U.S. 577, 593, 595 (1992) ("subtle and indirect" pressure to participate in religious ceremony can be as real as overt compulsion; "law reaches past formalism"); *Edwards*, 482 U.S. at 586-87 ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."). The contemporaneous newspaper accounts indicate the Vesta school is considered by both Brethren and non-Brethren citizens to be a school for the Brethren children. The Vesta school creates the perception that the state has

singled out the Brethren for special, preferential treatment by modifying the standard curricula to fit their religious objections. Such treatment has the primary effect of creating a state endorsement of the religious views of the Brethren, *Edwards*, 482 U.S. at 593 ("preference" for particular religious beliefs constitutes an endorsement of religion), and cannot be reconciled with the establishment clause cases which require the government to adopt a neutral position toward religion. *See, e.g., Kiryas Joel*, 114 S. Ct. at 2487; *Wallace v. Jaffee*, 472 U.S. 38, 52-54; *Epperson*, 393 U.S. at 104.

Three primary criteria are helpful in considering whether state action has the effect of advancing religion: whether it results in government indoctrination of religious beliefs, whether it defines the aid recipients by reference to religion, and whether it creates an excessive entanglement between the state and religion. *Agostini v. Felton*, Nos. 96-552, 96-553, 1997 WL 338583 (U.S. June 23, 1997) at *21. Applying these factors to the facts of this case, the actions of the district have the impermissible effect of advancing religion.

Aid that furthers the educational function of religious schools is no longer presumed to be invalid per se, *Agostini*, 1997 WL 338583, at *15, but state action may impermissibly indoctrinate religious beliefs when it provides direct aid to religious institutions or when it relieves sectarian institutions of costs they otherwise would bear. *Id.* at *17; *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993). Although the Vesta school is theoretically open to the public, the district's actions are suspect because they relieve the Brethren of costs they would have otherwise borne in homeschooling or establishing their own school. If this arrangement were upheld, it would no longer be necessary for Catholic, Lutheran, Jewish, or Muslim communities to expend the resources required to establish separate parochial schools. They could

also offer a district free rent in a building they own in exchange for a teacher and teaching materials and obtain a religiously homogeneous school with basic educational instruction to their liking. This is the type of direct subsidization that has the effect of advancing religion. *Agostini*, 1997 WL 338583, at *17; *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975) (lending instructional materials and equipment to sectarian schools has the effect of advancing religion).

Aid provided to all eligible children on the basis of neutral, secular criteria regardless of where they attend school is permissible because it does not define recipients on the basis of religion and does not provide incentives for recipients to modify their religious beliefs. *Agostini*, 1997 WL 338583, at *18-19; *see also Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In contrast, the effect of the Vesta operation is to provide a benefit for the Brethren which it does not provide for non-Brethren. The Brethren children can now obtain a publicly financed education in Vesta that conforms with their particular religious beliefs, while non-Brethren children, either with or without the reopened Vesta school, must still commute to Wabasso if they want to receive all of the curricula regularly offered by the district. The actions of the district violate the establishment clause because they have the effect of singling out the Brethren for a special benefit.

State aid or action will also advance religion if it leads to excessive entanglement between church and state.[10] The test for an impermissible entanglement examines the character and purposes of the institutions benefitted, the nature of the aid provided, and the resulting relationship between the government and the religious authority. *Agostini*, 1997 WL 338583, at *19 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971)). Here, the district has en-

[10] *Agostini* states that previous cases have essentially collapsed the "effect" and "entanglement" prongs of the *Lemon* test. *Id.* at *19.

tered into a contractual relationship with a religious group for mutual benefit, essentially forming a partnership between the Brethren and the district to open and operate the Vesta school with a curricula acceptable to the religious group.

There are many competing values in our richly diverse society, and the religion clauses of the first amendment protect the rights of all to practice the religion of their choice and also prevent the government from preferential advancement of any one religious group. Because the school district's establishment of the special school at Vesta crosses over the line permitted under the Constitution, I dissent.

A true copy

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MINNESOTA
THIRD DIVISION

No. 3-94-1597

MATTHEW STARK and MARCIA NEELY,
Plaintiffs,
v.
INDEPENDENT SCHOOL DISTRICT No. 640,
Defendants.

Aug. 22, 1996

Timothy E. Branson and Joel Wiginton of Dorsey & Whitney, Minneapolis, MN, and Robert J. Bruno, Burnsville, MN, for Plaintiffs.[1]

Pat A. Cipollone and C. Hunter Wiggins of Kirkland & Ellis, Washington, DC, and Erick G. Kaardal of Trimble & Associates, Ltd., Minneapolis, MN, for Defendants.

Roger A. Peterson of Peterson, Engberg & Peterson, Minneapolis, MN, for Amicus Minnesota Federation of Teachers.

MEMORANDUM AND ORDER

DAVIS, District Judge.

In September 1993, the Independent School District No. 640 ("School District") opened an elementary school in Vesta, Minnesota. Matthew Stark and Marcia Neely ('Plaintiffs") are Minnesota state taxpayers who have brought this action seeking to close the Vesta school on

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[1] Plaintiffs have agreed to dismiss the Brethren, as a party defendant, without prejudice and without costs or attorney's fees.

the basis that the creation and operation of the Vesta school violates the First Amendment's guarantee against the establishment of religion.

By its motion, Plaintiffs seek a declaration that the creation and operation of the Vesta school violates the Establishment Clause of the First Amendment and Art. 1 § 16 of the Minnesota Constittuion, a permanent injunction prohibiting the School District from operating the Vesta school or any other school in conformance with the Brethren's religious objections to the use of computers or other technology and media, a judgment against the School District requiring it to refund the state of Minnesota for all state aid received for the students who attended the Vesta school from 1993 to the present, and a judgment pursuant to 42 U.S.C. § 1988 in favor of Plaintiffs against the School District for Plaintiffs' reasonable attorneys' fees and costs of suit.

The School District moves the Court for an Order granting it summary judgment on the basis that the Vesta school is a public school that is simply accommodating the religious beliefs of the parents of the students that attend the Vesta school.

Background

In August 1992, Lloyd Paskewitz ("Paskewitz"), a member of a religious group known as the Brethren, sent a letter to the Superintendent of the School District, George Bates ("Bates").[2] In the letter, Paskewitz told

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[2] The full text of the letter reads as follows:

> As you know, we are very concerned about the education of our children.
>
> As believers in the Lord Jesus Christ, and seeking to be governed by Holy Scripture, we find the developing of evil very disturbing. Not that it isn't fortold in Scripture. We feel that 2 Timothy 2 verses 19-21 is our charter for these last days. In the main, the teachers have been very cooperative, and we appreciate the provision that has been made for us. We are sympathetic with you in your responsibility, and realize that

Bates of their [3] concern for the education of children, and of their fear of the rapid development of scientific devices.

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you have to teach more than you want to, or really have time for. We feel so much is placed upon the school administration that should be taught at home. The 3 R's are a bit neglected. (Working mothers do have an adverse affect on children).

The rapid development of scientific devices is to us a bit frightening in the light of Scripture. We feel that not going in for T.V., Radios, Computers, and Videos will definitely limit our young going into certain fields of work; but we feel that a strong moral fiber built into our young will prove to be sufficient to provide a way through so they have a suitable job and are able to fulfill righteousness. We as parents, I might just say in passing, have proved the goodness of God in this very connection.

Now we would like to make a suggestion for grades K through 6. We would provide a room at the Vesta School, free of charge, if the District would provide a teacher and books.

We would have no objection to it being a public school; but, could we as parents teach the children what they should be taught at home, so the teacher would be free to concentrate on the 3 R's. Our children are very tender, and have been very upset by looking at some movies in the past. They have not been hardened by all the violence and corruption that most children have quite a steady diet of.

Therefore, could it be in the charter of the school in Vesta:

That no T.V., Radios, and Computers be used.
That a sensible dress code be written up.
That no smoking, drinking or swearing be allowed.

There would be approximately 21 children that I know of that would be interested in K-6. We have also heard there might be others besides the Brethren that would want their children enrolled in Vesta.

We would require no school transportation, no lunches, and we could supply a helper for school recess.

The cost to the District would be primarily just the teacher's salary and books.

Yours truly,

Mr. Lloyd Paskewitz

[3] In the letter, Paskewitz uses the term "we", the inference being he refers to the concerns of the "Brethren."

To address these concerns, Paskewitz suggested to Bates that a school be opened in Vesta, Minnesota. Paskewitz stated they would provide the space free of charge, if the School District provided the teacher and books.[4] As to the curriculum to be taught. Paskewitz provided the following:

> We would have no objection to it being a public school; but, could we as parents teach the children what they should be taught at home, so the teacher would be free to concentratee on the 3 R's. Our children are very tender, and have been very upset by looking at some movies in the past. They have not been hardened by all the violence and corruption that most childen have quite a steady diet of.

Therefore, could it be in the charter of the school in Vesta:

> That no T.V., Radios, Videos, and Computers be used.
>
> * * * *

(Wiginton Aff.Ex. D).

The parties do not dispute that the Brethren consist of a group of people who possess similar beliefs, one such belief being the general objection to the use of technological devices, such as computers, television, films and other modern technology and media. The Brethren also practice separatist and anti-mixing beliefs by not eating meals with persons who do not share their beliefs. Historically, Brethren children attending public school required a separate table at lunchtime to allow the children to practice their separatist beliefs. (Paskewitz Dep. pp. 20-22).

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[4] The School District previously ran a public school in Vesta, Minnesota, but it was closed down in 1984 for economic reasons. Paskewitz owns the building that formerly housed the public school in Vesta, Minnesota.

In February 1993, the School District addressed the Paskewitz request at its regular Board Meeting. (Wiginton Aff.Ex. F). Therefore, the decision was made by the School District to open the school in Vesta for the 1993-1994 school year. On June 1, 1993, Paskewitz wrote Bates stating: "Following is a list of pupils that are planning to attend the Vesta Public School. Two of our children have moved, bringing the total to 19." (Wigginton Aff.Ex. H). In fact, the 19 children that attended the Vesta school during the 1993-94 school year were the same 19 children named in Paskewitz' letter.

In connection with the opening of the Vesta school, the School District, Paskewitz and the "Brethren" [5] entered into an Agreement on October 12, 1993, pursuant to which Paskewitz would lease the building to the School District free of charge and all maintenance, security, taxes and insurance would be paid by Paskewitz. (Wiginton Aff.Ex. R). In exchange, the School District agreed to provide a teacher and the necessary classroom materials and establish the curriculum. Section 6 of the Agreement provides "The School District shall, to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District, limit the use of technology such as television, radio, audio and/or video recordings, computers and movies in the classrooms at the school provided for herein." Sections 8 and 9 also reserve to the School District the right to provide special education or other services to students attending the Vesta School, at the Wabasso Elementary School.[6]

It is undisputed that computers and other technology or media have never been used at the Vesta school since its opening in 1993, while such tools are routinely used at the Wabasso school. And although no confirmation has

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[5] Brethren was apparently misspelled throughout the Agreement.

[6] From 1984, when the original Vesta Elementary School closed, up through the 1992-93 school year, all children residing in Vesta attended the Wabasso elementary school.

been made as to the religious affiliations of the students attending the Vesta school, there is evidence supporting the Plaintiffs' assertion that all of the children that have attended the Vesta school since its opening have been Brethren children, *See*, Eichten Dep. p. 35; Rohlik Dep. p. 11; Neely Dep. p. 18; Carlson Dep. pp. 61-62, and there is no evidence that non-Brethren children have attended the Vesta school since 1993. No religion classes are taught at the Vesta school.

The curriculum at the Vesta school also differs from the Wabasso school's curriculum to the extent that classes such as health, physical education and music are not offered at the Vesta school. Such classes are, however, available for the Vesta students at the Wabasso school. Furthermore, no lunches are provided at the Vesta school because the Brethren children go to their homes for lunch. The School District emphasizes, however, that if a non-Brethren child were to attend the Vesta school, that a lunch would be provided to that child at the school if so desired.

It is Plaintiffs' assertion that the above facts warrant a finding that the opening and operation of the Vesta school presents a clear violation of the Establishment Clause of the First Amendment.[7] The School District re-

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[7] In a footnote, the School District challenged Plaintiffs' taxpayer standing. The School District argues that to maintain taxpayer standing, Plaintiffs must show there has been a disbursement of tax money in potential violation of constitutional guarantees. The School District then asserts that as Plaintiffs have failed to show an "additional" disbursement of tax money in the creation of the Vesta school, they lack taxpayer standing, relying on *Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir.1989). The School District has misconstrued the holding in *Minnesota Fed'n of Teachers* for the Eighth Circuit specifically held it was not necessary to require a taxpayer to establish an increase in their tax burdens, for to do so may lead to an abolition of taxpayer standing altogether. 891 F.2d at 1358. Accordingly, the Court finds Plaintiffs have standing.

sponds that the opening and operation of the Vesta school was entirely within its discretion, and that the facts warrant a finding that the School District was merely accommodating the religious beliefs of parents as it is required to do by law. For the reasons stated herein, the Court finds the decision to open, and the manner of operation of, the Vesta school violates the Establishment Clause.

Standard for Summary Judgment

Summary judgment is appropriate if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir.1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Disputes over facts that might affect the outcome of the lawsuit according to applicable substantive law are material. *Id.* A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49, 106 S.Ct. at 2510-11.

Before the Court are cross-motions for summary judgment. Neither party is asserting genuine issues of fact exist to preclude summary judgment. Rather, the parties argue the facts as they exist warrant judgment in their favor as a matter of law.

Establishment Clause

The Establishment Clause of the First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." *McCollum v. Board of Educa-*

tion, 333 U.S. 203, 210-11, 68 S.Ct. 461, 464-65, 92 L.Ed. 649 (1948).[8] Primarily, the Establishment Clause proscribes the "sponsorship, financial support, and active involvement of the sovereign in religious activity." *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 381, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267 (1985) (internal citations omitted).

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any relgious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

Everson v. Board of Education of Ewing TP et al., 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed 711 (1947).

Not only does the Establishment Clause proscribe the creation of a state religion, it also requires that the government remain neutral to religion. *Parents' Assoc. of P.S. 16 v. Quinones,* 803 F.2d 1235, 1240 (2nd Cir.

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[8] The Minnesota Constitution also contains an establishment clause. ". . . [N]or shall . . . any preference be given by law to any religious establishment or mode of worship . . ." Art. 1, § 16.

1986) (*citing, School Dist. of Abington Tp. v. Schempp,* 374 U.S. 203, 215-16, 83 S.Ct. 1560, 1567-68, 10 L.Ed. 2d 844 (1963)). "The rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause diviseness and disrespect for government by those who hold contrary beliefs." *Id.*

In this case, the Court has been asked to determine whether the opening and operation of the Vesta school violates the Establishment Clause. In making this determination, a court must recognize that the states and local school boards are afforded comprehensive powers and substantial discretion in the operation of public schools. *Edwards v. Aguillard,* 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987). *See also Pratt v. Independent School District No. 831,* 670 F.2d 771, 775 (8th Cir.1982). A court must also recognize that it is within the school board's discretion to determine the most appropriate curriculum that is most suitable for the students, as well as the teaching methods and educational tools to be used. *Pratt,* 670 F.2d at 775. However, in exercising its broad discretion, the School District is nonetheless bound by the proscriptions of the Establishment Clause. When circumstances arise that directly and sharply implicate constitutional values, a court must intervene. *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 583-584, 107 S.Ct. at 2577. Thus, in its analysis, this Court must be ever mindful of the particular concerns that arise in the context of the public elementary schools.

To assist the Court in determining whether state action violates the Establishment Clause, the United States Supreme Court developed a three part test in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The *Lemon* test provides that to withstand scrutiny, the state action must have a secular purpose, its principle or primary effect must be one that neither advances nor inhibits religion and the state action must not foster an excessive entanglement with religion. *Id.* 403 U.S. at 612-13, 91 S.Ct. at 2111-12. In *Grand Rapids,* the Court noted that it particularly relied on *Lemon* in cases involving religion and schools. 473 U.S. at 383, 105 S.Ct. at 3222.

Today, the status of the *Lemon* test as a general purpose tool for administering the Establishment Clause is in doubt. *Sherman v. Community Consolidated School District 21 of Wheeling Township,* 980 F.2d 437 (7th Cir.1992) (citing U.S. Supreme Court cases in which *Lemon* called into doubt). *See also, Board of Education of Kiryas Joel Village School Dist. v. Grumet,* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (O'Connor, J., concurrence calling into doubt use of a single test on a constitutional principle that operates differently in different contexts) (Scalia, J. joined by Rehnquist, C.J., and Thomas, J. dissenting, *Lemon* test should be replaced). Although *Lemon* has not been expressly overruled, the United States Supreme Court has nonetheless decided many Establishment Clause cases without applying the *Lemon* test. *See e.g., Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982) (applying strict scrutiny); *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (finding government involvement with religious activity so pervasive to

the point of creating a state-sponsored and state-directed religious activity, that it was unnecessary to apply, or reconsider *Lemon*); *Kiryas Joel,* 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (statute clearly violated establishment clause because it delegated power to an electorate defined by common religious belief and practice in a manner failing to foreclose religious favoritism). Given the fact that *Lemon* is not uniformly applied, it appears that application of the test is no longer a prerequisite. It is nonetheless available as a guideline "with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Grand Rapids,* 473 U.S. at 383, 105 S.Ct. at 3222. As will be discussed in further detail below, the Court finds that the facts presented by this case provide a clear example of state sponsorship, or the advancement, of a religion which violates the mandates of the First Amendment and will rely on *Lemon* as a guideline only.

Analysis

The main thrust of the School District's argument in support of its decision to open and operate the Vesta school, is that it was accommodating the religious beliefs of the Brethren, as it is required to do by law. While it is true that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause," *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-day Saints v. Amos,* 483 U.S. 327, 334, 107 S.Ct. 2862, 2867, 97 L.Ed.2d 273 (1987) (*quoting, Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 144-145, 107 S.Ct. 1046, 1050-51, 94 L.Ed.2d 190 (1987)), it is also true that accommodation is not a principle without limits. *Amos,* 483 U.S. at 334-335, 107 S.Ct. at 2868. At some point, an accommodation may devolve into an unlawful fostering of religion. *Id.*

> The principle that government may accommodate the free exercise of religion does not supersede the funda-

> mental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith or tends to do so.'

Lee v. Weisman, 505 U.S. at 587, 112 S.Ct. at 2655. State action that in and of itself violates the Establishment Clause cannot be saved by labeling it an accommodation.

For example, in *Kiryas Joel*, the Court found that a statute enacted by a special and unusual Act failed the test of neutrality because it aided a particular religion. The Act at issue created a special school district whose boundaries were drawn to include only property owned and inhabited by a particular religious sect, which in turn empowered a locally elected board of education to take action such as opening and closing schools, hiring teachers and prescribing textbooks. The Court found the statute "departs from constitutional command by delegating the State's discretionary authority over public school to a group defined by its character as a religious community, in a legal and historical context that gives not assurance that the governmental power has been or will be exercised neutrally." *Id.* at ——, 114 S.Ct. at 2487.

In its analysis, the Court also recognized the Constitution allows the state to accommodate religious needs. *Id.* at ——, 114 S.Ct. at 2492. The Court referred to two of its prior decisions that upheld accommodations which allowed religious communities and institutions to pursue their beliefs free from governmental interference. *Id.* at ——, 114 S.Ct. at 2493 (*citing Corporation of Presiding Bishop v. Amos, supra,* (government may allow religious organizations to favor their own adherents in hiring, even for secular employment) and *Zorach v. Clauson*, 343 U.S.

306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (government may allow public schools to release students during the school day to receive off-site religious education)). The Court went on to state, however, that an otherwise unconstitutional delegation of political power to a religious group could never be saved as a religious accommodation. *Id.*

In another accommodation case, the Second Circuit Court of Appeals in *Parents' Assoc. of P.S. 16 v. Quinones,* was asked to issue a preliminary injunction enjoining a school district's plan to provide remedial education classes for students of a parochial school on public school premises. The parochial school at issue in this case, Beth Rachel, is a school which teaches girls of the Hasidic Jewish Faith. The Hasidic faith stresses a strict separation between the Hasidim and the rest of society, and stresses strict separation of males and females within the sect for virtually every activity, including schooling. Yiddish is the only language spoken in the home. To accommodate these strict religious beliefs, the school district proposed to provide remedial education to Beth Rachel students in nine classrooms in a wing of P.S. 16. The section would be closed off from the rest of the school through the construction of swinging doors and English would be taught as a second language.

The court found that the school district's plan plainly created a symbolic link between the state and the Hasidic sect that would likely have magnified negative impact on the minds of the young children attending P.S. 16. *Quinones,* 803 F.2d at 1241.

In this case, the School District asserts it accommodated the religious beliefs of the Brethren by opening the Vesta school, where to date, no technology is utilized. Furthermore, children are allowed to go home for lunch to accommodate the separatist beliefs of the Brethren. Finally, music, health and physical education are not

offered at the Vesta school, but is available to a Vesta student at the Wabasso school.

Plaintiffs assert, and this Court agrees, that a school district cannot open a school nor modify its curriculum based solely on the request of a religious group. In *Epperson v. Arkansas*, the Court found unconstitutional a state statute that made it unlawful to teach, in public schools and universities, the theory that man evolved from other species of life, or to adopt or use in a public school or university, a textbook that taught the theory of evolution. Applying the Establishment Clause's proscriptions in the school setting, the Court determined

> the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion . . . This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.

Epperson, 393 U.S. at 106-107, 89 S.Ct. at 271-72. The Court then applied what are essentially the first and second prongs of the *Lemon* test to reach its holding that the statute was unconstitutional—What was the purpose and primary effect of the statute? "If either is the advancement or inhibition of religion then the [statute] exceeds the scope of legislative power as circumscribed by the Constitution." *Id.* at 107, 89 S.Ct. at 272 (citation omitted). The Court found that the sole reason the statute was enacted was because of "fundamentalist sectarian convictions." *Epperson*, 393 U.S. at 107-108, 89 S.Ct. at 272-73. Accordingly, the statute's purpose and primary effect was that of advancing religion. *Id. Accord, Edwards v. Aguillard, supra* (striking down a state statute that required creation science be taught where evolution was taught because the purpose of the statute was to restructure the science curriculum to conform to religious beliefs).

In *Pratt v. Ind. School Dist. No. 831, supra* the Eighth Circuit Court of Appeals held a school board's decision to remove the film "The Lottery" from the curriculum was unconstitutional because the decision was not made to serve substantial or reasonable governmental interests. Rather, the court found the basis for the decision was because a majority of the school board found the film's ideological and religious themes offensive. *Id.* at 778. In reaching its decision, the court rejected the school board's purported rationale for its action and affirmed the district court's finding that "the self-serving statements of the school board, made after the fact and not based on the previous record, to the effect that this film is excluded because of the violence it teaches, are untenable in the light of the circumstances under which they were made." *Id.*

The School District attempts to distinguish *Epperson, Edwards* and *Pratt* from this case on the basis that they are not accommodation cases. As discussed above, the School District cannot escape the consequences of unconstitutional actions by labeling it an accommodation. The principles of *Epperson, Edwards* and *Pratt* are clearly applicable to this case, because such cases inform that the School District cannot tailor its curriculum for the sole purpose of conforming to religious beliefs.

After a careful review of the submissions of the parties and all relevant case law, the Court finds that the opening, and the manner of operation of, the Vesta school lacks a secular purpose and was done to conform to the religious beliefs of the Brethren.[9] The record before the Court

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[9] In its briefs, the School District asserts that this Court has already ruled that the Vesta school is secular on its face and does not advance or inhibit religion, citing the Report and Recommendation of Magistrate Judge John Mason, adopted by this Court. In the Report and Recommendation, Magistrate Judge Mason recommended Lloyd Paskewitz be dismissed without prejudice, as complete relief could be granted in his absence. The motion at issue

establishes that negotiations and discussions concerning the possible opening of a school in Vesta commenced only after the superintendent, Bates, received the letter written by Paskewitz offering a building site, free of charge, with suggestions as to the curriculum to be offered. There is no evidence that the School District had contemplated reopening the Vesta school prior to the receipt of Paskewitz' letter. When the school was opened in Vesta, at the building owned by Paskewitz, the curriculum provided to its students was modified to exclude the use of computers and any other type of technology or media. No school lunches were provided as all children were allowed to go home for lunch. What these undisputed facts suggest is that the School District made a decision to open and operate a school in the manner suggested by Paskewitz in his letter to Bates. In other words, in a manner that specifically conforms to the religious beliefs of the Brethren.

The primary effect of the School District's decision to open the Vesta school is that of promoting religion. Evidence has been presented to the Court which shows that the perception of the community is that the Vesta school is a "Brethren" school. Although the school's charter provides that the school is a public school, and that anyone residing in the school district can attend, only Brethren children have attended the school. This fact is significant

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in the Report and Recommendation addressed lawsuit structure. *See*, October 4, 1995 Report and Recommendation p. 5. The claims against Lloyd Paskewitz concerned the lease agreement entered into between Paskewitz, the Brethren and the School District. The Plaintiffs' claimed in their Complaint that the Agreement, in and of itself, violated the Establishment Clause. Magistrate Judge Mason noted a distinction needed to be drawn between the Agreement and the operation of the Vesta school. *Id.* at 6, and determined that the *Agreement* was secular on its face—not the operation of the Vesta school. Accordingly, the School District's assertion that this Court has previously determined the decision to open and operate the Vesta school is completely without merit.

because the complete segregation of the Vesta school population is not the result of a random feature or a geographic function. There are non-brethren children that live in Vesta whose parents have made the decision to send them to Wabasso, which is 14 miles away.

Furthermore, Plaintiffs' have submitted a number of area newspaper articles, which chronicled the events leading up to the opening of the Vesta school. In these articles, many references are made to the agreements made between the Vesta Brethren and the School District to open an elementary school in Vesta.

> Bates mentioned the plans of the Vesta religious organization known as The Brethren to open an elementary school in Vesta next year.
>
> Following a meeting between school administration and Brethren representatives on Feb. 3, it looked very probable that the school will open next fall.

The Redwood Gazette, dated Monday, February 15, 1983, Wiginton Aff. Ex.G.

> The Wabasso Board of Education has reached agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.
>
> The board approved a motion to "begin pursuing legal avenues" to try and get the school open this fall.
>
> The Brethren, who sent about a dozen representatives to Monday's board meeting, were also asked to look into how much it would cost to get the former Vesta school building—which they own—remodeled according to current state building, health and safety codes.
>
> If it is legally posesible to establish this school, it would be operated without the assistance of modern technology such as computers, and video and audio equipment. The reasoning behind this is that the

> Brethren's religious beliefs prohibit them from using such items and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.
>
> * * * *

The Redwood Gazette, dated June 17, 1993, Wiginton Aff.Ex.I.

Another example of the perceptions of the community that the Vesta school is a "Brethren" school is an application the School District received when it was in the process of hiring a teacher for the Vesta school. In the cover letter, the applicant thought it important to note that she had experience at "church affiliated schools." Wiginton Aff.Ex.J.

What the School District has done is create an impermissible identification of its powers and duties with the religious beliefs of the Brethren by agreeing to open the Vesta school in a building owned by a Brethren brother, and in the manner expressed by the Brethren. The fact that no religion is taught at the school does not affect the constitutional violation in this case.

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

Grand Rapids, 473 U.S. at 389, 105 S.Ct. at 3225. "The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* (*quoting, Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-126. 103 S.Ct. 505, 511-12, 74 L.Ed.2d 297 (1982)).

Because this case involves a public elementary school, the perceptions of the young children of this community are of the utmost importance. "[P]roviding a crucial symbolic link between government and religion, thereby enlising—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination." *Quinones,* at 235 (*citing Grand Rapids,* 473 U.S. at 383, 105 S.Ct. at 3222).

Nor does it matter that the state action involved in this case only benefits and endorses the beliefs of one religious sect. *Kiryas Joel,* 512 U.S. at ——, 114 S.Ct. at 2481. ("Here the benefit flows only to one single sect, but aiding this single, small religious group causes no less a constitutional problem that would follow from aiding a sect with more members or religion as a whole.") It is this Court's determination that the undisputed facts as presented by the parties clearly establish that the opening and operation of the Vesta school "conveys a message of government endorsement . . . of religion" that violates a core purpose of the Establishment Clause.

The School District argues that its decision to open the Vesta school, and the decision not to utilize technology there was made without inquiring into parental motivation. In its brief, the School District asserts that the presentation to the school board regarding the possible opening of the Vesta school did not contain references to the religious backgrounds or beliefs of the students who would attend the Vesta school. (Mem. in Opp. to Plaintiffs' Motion for S.J. and in Support of Def.'s Cross Motion for S.J., p. 18.) Sufficient evidence has been presented, however, to establish that the members of the school board were completely cognizant of the relationship between the proposition to open a school in Vesta and the religious affiliations of those parents proposing the school and the religious tenets of the Brethren which do not encompass the use of technology or other media. (*See*, Wiginton, Aff.

Exs. G. I, M, and N, Articles from *The Redwood Gazette;* Wiginton. Aff.Ex.F, School Board's minutes "Meeting with the Brethren, Vesta Building.")

The School District also argues the Vesta school's curriculum is consistent with other schools within its boundaries as technology is *offered* at the Vesta school. In reality, however, technology is not offered at the Vesta school. The teachers at the Vesta school testified at their depositions that technology has not been available at Vesta since its opening in 1993. The record before the Court suggests that because the perception exists that the Vesta school is a Brethren school, non-Brethren children will not attend Vesta and technology will continue to be conspicuously absent.

Finally, the School District argues that what Plaintiffs are asking the Court to do is unlawfully discriminate against religion under the guise of an improper interpretation of the Establishment Clause. A similar argument was addressed in *Quinones, supra.*

> The Free Exercise Clause of the First Amendment ("Congress shall make no law . . . prohibiting the free exercise [of religion]") does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief if it can show a compelling reason for doing so . . . Avoiding a violation of the Establishment Clause that would otherwise result from an apparent endorsement of the tenets of a particular faith is ample reason for compelling that choice.

803 F.2d at 1241-1242. The court in *Quinones* went on to note that "it was difficult to believe" that alternatives were not available that would not invoke the Establishment Clause. *Id.* at 1242.

Similarly, in this case, this Court finds it difficult to believe that alternatives are not available to the School District, which would accommodate the religious beliefs of

the Brethren without resulting in such a clear endorsement of the Brethren's belief, as is the result here. Were not accommodations made for the Brethren children prior to the opening of the Vesta school?

Based on the above, the Court finds that the creation and operation of the Vesta school violates the mandates of the First Amendment's Establishment Clause as well as the Article 1, Section 16 of the Minnesota Constitution, by advancing religion.

In addition to requesting a declaration that the creation and operation of the Vesta school violates the Establishment Clause, and a permanent injunction enjoining further operation of the Vesta school or any school in conformance with the Brethren's religious beliefs, Plaintiffs also ask that the School District be required to refund the State of Minnesota all state aid received for the students who have attended the Vesta school since its inception and a judgment for attorney's fees and costs. Plaintiffs did not argue their entitlement to such relief in their briefs to the Court, and the Court is reluctant to do so at this time.

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part.

2. Independent School District No. 640 (the "School District") violated the Establishment Clause of the First Amendment and Art. 1, § 16 of the Minnesota Constitution by agreeing with the religious group known as the Brethren to open and operate a public elementary school for Brethren children in space leased for free from a member of the Brethren with a curriculum modified to delete the use of computers and other technology and media in conformance with religious objections raised by the Brethren.

3. The School District's operation of the Vesta School, attended only by Brethren children, with a curriculum

modified to conform to Brethren religious objections to computers and other technology and media violates the United States and Minnesota Constitutions.

4. The School District is hereby enjoined from operating the Vesta School or any other school in conformance with the Brethren's religious objections to the use of computers and other technology and media.

5. The remaining requests for relief, concerning refunds to the State of Minnesota and a judgment of reasonable attorney's fees and costs are DENIED without prejudice. The parties may each submit a five page brief addressing the issues of refund and attorney's fees by August 29, 1996. No responsive briefs will be accepted by the Court.

6. Plaintiffs' claims against the Brethren are dismissed without prejudice and without costs or attorney's fees.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3250MNST

MATTHEW STARK, *et al.*,
Appellees,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640, ETC.
Appellant,

JEFF PASKEWITZ, *et al.*,
Amicus Curiae.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

November 24, 1997

Order Entered at the Direction of the Court:

/s/ Illegible
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX D

August 1992

Mr. George Bates, Superintendent
Wabasso Public School
District #640
Wabasso, Minnesota

Dear Mr. Bates:

As you know, we are very concerned about the education of our children.

As believers in the Lord Jesus Christ, and seeking to be governed by Holy Scripture, we find the developing of evil very disturbing. Not that it isn't fortold in Scripture. We feel that 2 Timothy 2 verses 19-21 is our charter for these last days.

In the main, the teachers have been very cooperative, and we appreciate the provision that has been made for us. We are sympathetic with you in your responsibility, and realize that you have to teach more than you want to, or really have time for. We feel so much is placed upon the school administration that should be taught at home. The 3 R's are a bit neglected. (Working mothers do have an adverse affect on children).

The rapid development of scientific devices is to us a bit frightening in the light of Scripture.

We feel that not going in for T.V., Radios, Computers, and Videos will definitely limit our young going into certain fields of work; but we feel that a strong moral fiber built into our young will prove to be sufficient to provide a way through so they have a suitable job and are able to fulfill righteousness. We as parents, I might just say in passing, have proved the goodness of God in this very connection.

Now we would like to make a suggestion for grades K thru 6. We would provide a room at the Vesta School,

free of charge, if the District would provide a teacher and books.

We would have no objection to it being a public school; but, could we as parents teach the children what they should be taught at home, so the teacher would be free to concentrate on the 3 R's. Our children are very tender, and have been very upset by looking at some movies in the past. They have not been hardened by all the violence and corruption that most children have quite a steady diet of.

Therefore, could it be in the charter of the school in Vesta:

That no T.V., Radios, Videos, and Computers be used.

That a sensible dress code be written up.

That no smoking, drinking or swearing be allowed. There would be approximately 21 children that I know of that would be interested in K-6. We have also heard there might be others besides the Brethren that would want their children enrolled in Vesta.

We would require no school transportation, no lunches, and we could supply a helper for school recess.

The cost to the District would be primarily just the teacher's salary and books.

Yours Truly,

Mr. Lloyd Paskewitz

c.c. Mr. Richard Pattee

APPENDIX E

AGREEMENT

THIS AGREEMENT is entered into this 12th day of October, 1993, by and between the School Board of Independent School District No. 640, Wabasso, Minnesota (hereinafter referred to as the "School District"), Brethren and Lloyd Paskewitz (hereinafter referred to as ("Paskewitz").

WHEREAS, Brethren educated resident secondary students of the School District during the 1992-93 school year in a home-school pursuant to Minn. Stat. §§ 120.101 and 120.102, and intends to educate resident elementary students of the School District in kindergarten through grade 6 for the 1993-94 school year in a home-school; and

WHEREAS, the School District wishes to open a public school in Vesta, Minnesota for the purpose of educating resident students of the School District in kindergarten through grade 6 in a multi-age/grade classroom commencing with the 1993-94 school year; and

WHEREAS, a member of Brethren, Paskewitz, owns a building located in Vesta, Minnesota which previously housed the old elementary school in Vesta;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties do hereby agree as follows:

I. OPERATION OF SCHOOL

Section 1. *Elementary School.* The School District shall operate a public school for any resident student in the School District in Kindergarten through grade 6 of the old elementary school in Vesta, Minnesota. The students educated at said school shall be educated in a multi-age/grade classroom.

Section 2. *Teaching Staff.* The School District shall provide one licensed elementary teacher to provide all instruction to all students enrolled at the school as provided in this Article Any and all teaching staff provided by the School District pursuant to this Agreement shall not be considered employees of Brethren or Paskewitz for any purpose, including, but not limited to, salaries, wages or other compensation or fringe benefits; worker's compensation; unemployment compensation; teachers' or public employees' retirement; social security; liability insurance; keeping of personnel records; termination or discharge of employment; individual contracts; and continuing contract rights.

Section 3. *Administration.* The School District shall provide administrative services for the school as provided in this Article on such a basis as it, in its sole discretion, deems necessary.

Section 4. *Curriculum.* The School District shall establish the curriculum of study and adopt rules and regulations for all students attending said school in compliance with state laws and rules.

Section 5. *Classroom Materials.* The School District shall provide such classroom materials as it deems necessary for the instruction of the students in said school. Brethren shall have the right to comment on and provide imput regarding the selection and use of such materials to the same extent as other parents in the School District pursuant to applicable law and the rules and regulations adopted by the School Board of the School District. The School District, however, retains the sole discretion in regard to the final approval of any textbooks and/or materials utilized in the instruction of said students.

Section 6. *Use of Technology.* The School District shall, to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District, limit the use of technology such as tele-

vision, radio, audio and/or video recordings, computers and movies in the classrooms at the school provided for herein.

Section 7. *School Calendar.* The School District shall establish the school calendar pursuant to Minn. Stat. § 126.12.

Section 8. *Special Education.* The School District reserves the right to provide special education services to any elementary student who is educated at the school as provided for herein and is eligible for special education services pursuant to state and/or federal laws and the rules and/or regulations promulgated thereunder at the Wabasso Elementary School.

Section 9. *Other Services.* The School District reserves the right to educate any student who wishes to be educated at the school as provided for herein and who is eligible to receive, or wishes to receive, other services such as Chapter I, counseling, health, physical education, music and/or hot lunch at the Wabasso Elementary School.

Section 10. *Transportation.* The School District shall provide transportation to all eligible students pursuant to Minnesota law and the rules promulgated thereunder.

Section 11. *School District Policies. All policies* adopted by the School Board of the School District including, but not limited to, those policies regarding the operation of a smoke and drug-free environment and discipline and behavior of students, shall apply at the school provided for herein, unless specifically provided otherwise.

II. BUILDING

Section 1. *Building to be Used as School.* Brethren and Paskewitz shall lease to the School District such classrooms and/or education space in the old elementary school in Vesta, Minnesota, as deemed necessary by the School District for purposes of operating a school as provided for in Article I herein.

Section 2. *Consideration for Lease of Premises.* The sole consideration on the part of the School District for the use of the leased premises shall be the provision of educational services as provided for herein, while the consideration to Brethern and Paskewitz for providing such premises shall be the provision of educational services by the School District in Vesta.

Section 3. *Utilities.* Bretheren and/or Paskewitz shall make adequate provision and fully and promptly pay for all gas, heat, power, telephone services or other public utilities of every kind requested by the School District and furnished to the leased premises throughout the term hereof.

Section 4. *Condition of Leased Premises.* Brethern and Paskewitz represent that they are not aware of any substantial defect in the old elementary school in Vesta, Minnesota, and that said school is in compliance with all applicable laws, codes and/or rules for the use of a school building. In the event that any maintenance, repairs, improvements and/or alterations are required to bring said building in compliance with any applicable laws, codes and/or rules, Brethern shall be solely responsible for performing such maintenance repairs, improvements and/or alterations at its own expense.

Section 5. *Maintenance, Repair or Replacement.*

Subd. a. *Custodial Services.* Brethern shall provide at its own expense all reasonable and required custodial services.

Subd. b. *Maintenance and Repair.* Brethern shall maintain and repair at its own expense all facets of said building including, but not limited to, maintenance, repair or replacement of all structural members, walls, footings, roofs, doorways and floors; maintenance of all parking areas, driveways and walkways, maintenance, repair or replacement to the

boiler and heat system, water supply and/or other plumbing, and electrical system. All maintenance, repairs and replacements shall be made promptly and in a good workman-like manner.

Subd. c. *Snow Removal.* Brethern shall be responsible for the removal of snow and ice from the sidewalks and parking areas at its own expense.

Subd. d. *Mowing of Grass.* Brethern shall be responsible for mowing all grass and trimming of shrubs, bushes and/or trees at its own expense located on the property upon which the building is situated.

Section 6. *Representation of Title.* Brethern and Paskewitz represent that they have full right, power and authority to enter into a lease of the premises in question and for the term herein granted and that the premises may be used by the School District for the entire term, unless earlier terminated, for the purposes set forth herein.

Section 7. *Security.* Brethern shall be solely responsible for the security of the school building.

Section 8. *Hours of Use.* Brethern and Paskewitz shall make the school building available during any hours designated by the School District.

Section 9. *Religious Symbols and/or Artifacts.* Brethern and Paskewitz shall ensure that no religious symbols and/or artifacts are displayed in those portions of the building utilized by the School District pursuant to this Agreement and that no religious instruction shall take place at said building.

Section 10. *Taxes.* Brethern and Paskewitz shall be responsible for the payment of any and all real estate taxes levied with respect to the school building and shall make payment of any such taxes promptly when due.

III. INSURANCE

Section 1. *Property Insurance.*

Subd. a. *Building.* Paskewitz shall at all times during the term of this Agreement obtain and maintain in full force and effect a property insurance policy covering the entire school bulding and the property of Paskewitz and/or Brethren, at its own expense. Paskewitz shall have the School District named as a loss payee on such insurance.

Subd b. *Personal Property of School District.* The School District shall be solely responsible for obtaining, at its own expense, insurance sufficient to cover its personal property located within the school building.

Section 2. *Liability Insurance.* Brethren and Paskewitz shall at their own expense keep in full force and effect during the term of this Agreement a public liability insurance policy naming the School District as an additional insured, protecting Brethren, Paskewitz and the School District from liability to any person for personal injury or property damage arising out of, connected with, or relating to the use of the building as a school provided for herein. The limits of said policy shall be in accordance with Minn. Stat. Ch. 466, as amended, or the limits of any public liability policy maintained by the School District, whichever is greater.

Section 3. *Additional Requirements for Insurance Policies.* Any insurance policies required pursuant to this Article shall contain a clause requiring the insurer to give the School District at least thirty (30) days prior written notice of any alteration of the terms of such policies or the cancellation thereof.

Section 4. *Certificates of Insurance.* Brethren and/or Paskewitz shall provide the School District with certificates of any and all insurance required pursuant to this Article.

IV. INDEMNIFICATION

Section 1. *Indemnification by Brethren.* Brethren and Paskewitz shall defend, indemnify, and hold harmless the School District, its officers, agents and employees harmless from and against any and all claims, any liability, loss, cost, damage and expense, including attorneys' fees, by reason of personal injury or property damage to any person or persons, including property damage to the school building, resulting from or connected with the exercise of the School District of its rights under this Agreement.

V. DURATION AND TERMINATION

Section 1. *Duration.* This Agreement shall be for a period of three years, commencing on July 1, 1993 and terminating on June 30, 1996.

Section 2. *Termination.* Notwithstanding Section 1 of this Article, either party may terminate this Agreement at the end of any school year during the term of this Agreement by giving written notice to the other party of its intent to termination the Agreement by January 15th of the year of termination (i.e. notice of termination given by January 15, 1994, would terminate the Agreement effective June 30, 1994).

VI. NOTICES; AMENDMENTS; INTERPRETATION; SAVINGS CLAUSE

Section 1. *Notices.* All notices required to be given by one party to the other parties under this Agreement, unless specifically provided otherwise, shall be in writing and sent by registered or certified mail addressed to the individuals designated below:

WHEREFORE, this Agreement was entered into on the date first referred to herein and the parties, by their duly authorized officers, have hereunto set their hands and seals on said date.

INDEPENDENT SCHOOL DISTRICT No. 640 WABASSO, MINNESOTA	BRETHREN
By: /s/ [Illegible]	By /s/ Ron Paskowitz Its:
By: /s/ [Illegible]	/s/ Lloyd Paskowitz LLOYD PASKOWITZ

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX G

MINN. STAT § 126.699 (1993)

Each school district shall have a procedure for a parent, guardian, or an adult student, 18 years of age or older, to review the content of the instructional materials to be provided to a minor child or to an adult student and, if the parent, guardian, or adult student objects to the content, to make reasonable arrangements with school personnel for alternative instruction. Alternative instruction may be provided by the parent, guardian, or adult student if the alternative instruction, if any, offered by the school board does not meet the concerns of the parent, guardian, or adult student. The school board is not required to pay for the costs of alternative instruction provided by a parent, guardian, or adult student. School personnel may not impose an academic or other penalty upon a student merely for arranging alternative instruction under this section. School personnel may evaluate and assess the quality of the student's work.